



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, DC 20224

SMALL BUSINESS / SELF-EMPLOYED DIVISION

November 5, 2009

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Expiration: November 5, 2010
IRM Impacted: IRM 5.1.9

MEMORANDUM FOR DIRECTORS, COLLECTION AREA OFFICES

FROM: **For** Frederick W. Schindler /s/ **Ken Marek**
Director, Collection Policy

SUBJECT: Reissuance of Interim Guidance Memorandum for Internal Revenue Manual (IRM) 5.1.9, Collection Appeal Rights

The purpose of this memorandum is to reissue interim guidance memorandum dated November 7, 2008, with control number SBSE-05-1108-061, titled Interim Guidance for Internal Revenue Manual (IRM) 5.1.9, Collection Appeal Rights. Recent changes to Internal Revenue Code (IRC) sections 6320 and 6330 require that the taxpayer provide a reason for the requested Collection Due Process (CDP) hearing.¹ In addition, if the taxpayer provides a frivolous basis for requesting a hearing, then that portion of the hearing request is to be treated as if the hearing request was not submitted.²

New IRC section 6702(b) provides for a penalty of \$5,000 if any portion of a request for a hearing under IRC section 6320 (relating to notice and opportunity for hearing upon filing of notice of lien) or IRC section 6330 (relating to notice and opportunity for hearing before levy) is based on a "specified frivolous position," or reflects a desire to delay or impede the administration of federal tax laws. Section 6702(d) provides that the "Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws."

¹ IRC Section 6330(b)(1) In general. —If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals.

² IRC Section 6330(g) Frivolous Requests for Hearing, etc. —Notwithstanding any other provision of this section, if the Secretary determines that any portion of a request for a hearing under this section or section 6320 meets the requirement of clause (i) or (ii) of section 6702(b)(2)(A), then the Secretary may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review.

Procedures for implementing section 6330(b)(1), 6330(g), and 6702(b) provisions are attached to this memorandum and will be incorporated into IRM 5.1.9 within one year from the date of this memorandum. Procedures for reducing the section 6702(b) penalty under section 6702(d) will be issued in supplemental Interim Guidance in the future.

Please ensure that this information is distributed to all affected employees within your organization.

If you have any questions, please feel free to contact me or Ken Marek, Program Manager, or a member of your staff may contact Tasia Agne, Senior Program Analyst. Territory personnel should direct any questions, through their management staff, to the appropriate Area contact.

Attachment

1. Taxpayers may submit one of the following 3 types of hearing requests:
 - a) Requests that fail to list a reason for the dispute and/or fail to check a reason box on Form 12153.
 - b) Requests that include a reason that appears to be frivolous or reflects a desire to delay the administration of federal tax laws.
 - c) Requests that include a reason that appears to be frivolous or reflects a desire to delay the administration of federal tax laws and a legitimate reason.
2. If a hearing request is received where a taxpayer fails to list a reason for the dispute, the CDP or EH request is considered a non-processable request. Follow the procedures in IRM 5.1.9.3.2.2 or IRM 5.1.9.3.2.4 to "perfect" a non-processable hearing request.
 - a) Give the taxpayer an opportunity to make the request processable.
 - b) Tell the taxpayer that a CDP hearing will not be granted if a reason is not provided.
 - c) The request is not processable if corrective action is not taken within the time period provided for perfection.
 - d) The taxpayer is not entitled to a CDP hearing on a non-processable request.
 - e) Document the determination.
 - f) Do not forward the non-processable request to Appeals.
3. If you receive a hearing request that includes a reason that appears to be frivolous or reflects a desire to delay or impede the administration of federal tax laws, forward the request to Appeals. Note "Frivolous Request" on the Form 3210, Document Transmittal. Appeals will make the determination regarding whether the hearing request or any part of the hearing request meets that criteria.
 - a) A request is deemed frivolous if the sole reason for the request is based on a specified frivolous position identified by the IRS in Notice 2008-14.
 - b) A request is deemed to reflect a desire to delay or impede the administration of federal tax laws if it only lists a reason that, while not one of the published specified frivolous positions, is a position which on its face has no basis for validity in existing law, or which has been deemed frivolous in a published opinion of the United States Tax Court or other court of competent jurisdiction.
4. If a frivolous or desire to delay reason is the only issue raised, Appeals will issue a letter to the taxpayer that will give them 30 days to amend the request, either
 - a) To withdraw the reason and provide a legitimate reason; or
 - b) To withdraw the entire hearing request.

Note: The taxpayer must amend or withdraw the request in writing to avoid the \$5,000 IRC 6702(b) penalty.

If the taxpayer does not take corrective action, Appeals will disregard the hearing request and return the case to the originating Collection office.

5. If, in addition to a frivolous or desire to delay reason, the taxpayer provides a non-frivolous issue, such as hardship or innocent spouse claims, Appeals will disregard the frivolous/desire to delay portion of the hearing request and conduct the hearing only on the legitimate issue. Appeals will issue a letter giving the taxpayer 30 days to withdraw the frivolous/desire to delay position to avoid the \$5,000 IRC 6702(b) penalty as well as to schedule a conference for the legitimate issue.

After the hearing, Appeals will issue a Notice of Determination or Decision Letter addressing the legitimate issues and will include a statement that the taxpayer also raised a frivolous/desire to delay position if such position or desire-to-delay reason is not withdrawn.

6. Appeals will not make a determination regarding the assessment of the IRC section 6702(b) penalty. However, it will identify when the request meets the criteria for penalty assessment. The hearing request containing a frivolous or desire to delay position will be returned to Collection when an entire hearing is disregarded or when the hearing is concluded if a legitimate issue is raised in addition to a frivolous or desire to delay position.

Appeals will return the case with the following:

- a) Form 5402, Appeals Transmittal and Case Memo. It will include a statement that Appeals has determined that the issues raised in the CDP/EH request were either a "specified frivolous position", identified by the IRS in Notice 2008-14, or intended to delay or impede the hearing process.
- b) A copy of the taxpayer's frivolous CDP/EH hearing request (Form 12153).
- c) A copy of the letter or letters Appeals issued soliciting a withdrawal of taxpayer's "specified frivolous position" or desire to delay position.
- d) A copy of Appeals case history notes documenting any discussion it had with the taxpayer regarding the withdrawal request.
- e) A copy of any written communication received from the taxpayer in response to the withdrawal solicitation.
- f) A copy of the notice of determination or decision letter (for cases where the taxpayer raises a legitimate issue and an un-withdrawn frivolous or desire-to-delay issue).

7. Upon receipt of the information from Appeals that the request meets the criteria for assessment of the \$5,000 IRC section 6702(b) penalty, the collection employee will take the necessary steps to have the penalty assessed.

- a) Verify that the hearing request includes one of the following:
 - A "specified frivolous position" identified by the IRS Notice 2008-14.
 - A frivolous argument not listed in Notice 2008-14 but is a position which on its face has no basis for validity in existing law, or which has been deemed frivolous in a published opinion of the United States Tax Court or other court of competent jurisdiction."
- b) Verify that the frivolous/desire-to-delay position of the request or the entire hearing request was not withdrawn.
- c) Prepare a Form 3210, Document Transmittal addressed to Ogden Compliance Services, Attn: FRP, M/S 4450, 1973 N. Rulon White Blvd, Ogden, Utah, 84404. List the following:
 - TIN
 - Name Control
 - MFT 55, Period (if multiple periods, use the latest period on the hearing request)
 - Penalty Reference Code 543 which is used for IRC section 6702(b) penalties.
- d) Attach the following to the Form 3210:
 - A copy of the taxpayer's CDP/EH hearing request.

- A copy of the letter or letters Appeals issued soliciting a withdrawal of the taxpayer's "specified frivolous position" or desire-to-delay position.
- A copy of Appeals case history notes documenting any discussion the Appeals Officer had with the taxpayer regarding the withdrawal request.
- A copy of any written communication received from the taxpayer in response to the withdrawal solicitation.
- Form 5402, Appeals Transmittal and Case Memo. It will include a statement that Appeals has determined that the issues raised in the CDP/EH request were either a "specified frivolous position" identified by the IRS in Notice 2008-14 or intended to delay or impede the hearing process.

e) The group manager will

- Document approval of the penalty assessment by writing "Determination to assess penalty pursuant to IRC 6702(b) approved" on the Form 3210.
- Sign the Form 3210.
- Maintain the Form 3210 control at the group level.
- Follow-up with Ogden if Ogden does not acknowledge receipt of the Form 3210 within 15 days.

8. The Frivolous Return Program at the Ogden Compliance Services Campus will receive the documents and process the request for penalty assessment. The penalty will be assessed as an MFT 55 Civil Penalty, Penalty Reference Code 543.

9. Section 6702(d) provides that the "Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws." Procedures for reducing the section 6702(b) penalty under section 6702(d) will be issued in supplemental Interim Guidance in the future.